No. 86-1010

In The
UNITED STATES SUPREME COURT
October Term, 1986

JOSEPH HOLYFIELD, JR.,
and LARRY HOLYFIELD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUZANNE CAROL SCHUELKE
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Attorney for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Speedy Trial Act requires the exclusion, from its computation, the time spent on a Co-Defendant's interlocutory appeal, where the Government is aware that the must be severed prior to trial?

2. What is the proper test for courts to use in determining whether criminal defendants waive their right to presence?

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OPINIONS BELOW

The opinion and mandate of the United States Court of Appeals for the Sixth Circuit affirming the Petitioner's convictions are reproduced as Appendix C

and D respectively. The order of the Honorable Anna Diggs Taylor excluding time from Speedy Trial Act computations is attached as Appendix B. The order of the United States Court of Appeals for the Sixth Circuit staying the proceedings below is reproduced in Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals is dated October 1, 1986. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. ¶3161 (h) of the Speedy Trial Act of 1974 provides that: The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time

within which the trial of any such offense must commence. (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to -- (E) delay resulting from any interlocutory appeal.

18 U.S.C. ¶3161 (7) provides that "A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted."

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of

the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF CASE

Petitioner's Larry and Joseph Holyfield were convicted in the United States District Court for the Eastern District of Michigan of bank robbery, 18 U.S.C. §2113 (a) (d), following a joint jury trial in front of the Honorable Anna Diggs Taylor. On July 6, 1984 they were sentenced to fifteen years incarceration and timely appealed to the Sixth Circuit, which affirmed their convictions on October 1, 1986.

The case arose from a 1982 robbery of the Liberty State Bank in Hamtramck, MIchigan. Joseph Holyfield, Jr., Larry

Holyfield, and Alan Reese were charged with bank robbery. Mr. Reese eventually pled guilty. The Petitioners were convicted by jury. At the same trial, the Petitioner's sister, Cheryl Holcomb, was acquitted of receiving the proceeds of a bank robbery, contrary to 18 U.S.C. §2113 (c) and their father, Joseph Holyfield, Sr. was acquitted of being an accessory after the fact contrary to 18 U.S.C.§3.

The trial which resulted in conviction was the result of the second indictment on the identical charge. On August 6, 1982 the Holyfields were arraigned on file 82-80344. On August 24, 1982 Alan Reese filed an interlocutory appeal based on the trial court's disqualification of his attorney. At this time and during the pendency of the appeal, Petitioners indicated in

writing that they wished tiral to proceed. On October 7, 1982 the Sixth Circuit entered an order staying proceedings in Reese's case, The lower court stayed the proceedings as to all defendants based on this. The appeal was finally decided on March 16, 1984. The Court of Appeals held that the Government did not adequately show that a conflict of interest existed between Edison and Reese. The Court noted that even if such a conflict of interest did exist, Reese must be given an opportunity to waive his right to conflict free counsel. 699 F.2d 803. Subsequently, the Government moved to sever Reese's trial from that of the Holyfield's. The prosecution dismissed the indictment on May 11, 1983 due to hospitilization of a finger print expert.

The indictment was reissue and Larry

Holyfield was rearraigned on October 21, 1983. Joseph was rearraigned on October 25, 1983. For the first time, Cheryl Holcomb and Joseph Holyfield, Sr. were joined in the same indictment. Defendants brought a Motion to Dismiss the case On November 18, 1984 due to Speedy Trial violations. The trial court denied the motion on January 16, 1984.

Trial commenced on April 19,1986. The only issue was identification of the perpetrators of the robbery. At trial, Joseph Holyfield was forced to miss several days of trial because of an emergency unscheduled hospitilization for bleeding ulcers. (TT VII, 735). Joseph Holyfield's lawyer missed a day because of a previous engagement. (TT VI, 604).

Defendants were convicted as charged. They were subsequently sentenced to fifteeen years

incarceration. There convictions were affirmed on October 1, 1986 by the Court of Appeals.

This petition follows.

REASONS FOR GRANTING WRIT

Two issues are presented for review by this Court. The first relates to the Petitioner's statutory guarantee of a speed trial. The other issue deals with what is the proper standards to be utilized by Courts in determining whether there is a proper waiver of the Defendant's right to presence.

The first issue contains two separate ideas which are argued as one for purposes of brevity. Briefly, these issues are: (1) Is time spent on a co-defendant's interlocutory appeal per se excludable from speedy trial act computations, or is it excludable only if it is reasonable? (2) If only a reasonable time period may be excluded, is it reasonable for a court to exclude this time where a severance is unavoidable, because the Government

believes that it can get the co-defendant to cooperate with them after the appeal? The presence issue questions what the proper standard is in getting a waiver of the defendant's right to constitutional right and particularly whether the presumption against strict waivers found in Johnson v. Zerbst[1] applies to waiver of this right. This is an issue which has created a strong division amongst the lower courts.

I.

SPEEDY TRIAL VIOLATIONS

Within the last twenty-five years the number of appeals, criminal and civil, have grown in leaps and bounds.[2]

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1 304 U.S. 458 (1938).

2 According to the National Advisory Commission on Criminal Justice Standards and Goals, Courts (Washington D.C.,

Interlocutory appeals have been no exception to this trend. Often the issues raised on appeal apply only to one Defendant and not the other.[3]

Petitioners, Joseph and Larry Holyfield contend that their case should have been dismissed with prejudice under 18 U.S.C. § 1862. The instant case is the second indictment of the Petitioners.[4] Both Larry and Joseph Holyfield were originally indicted on August 6, 1984. At the same time, one

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G.P.O., 1973) this figure may be as high as ninety percent in some jurisdictions.

3 This has particularly been the case since the elimination of the automatic standing rule in search and seizure cases. Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Salvucci, 448 U.S. 83 (1979)

4 Defendants do not contest that time between dismissal of the first indictment and commencement of the second indictment are excludable for Speedy Trial Act computations.

Allen Reese was also indicted. Almost immediately, the government made a motion to disqualify Reese's attorney,. Jeffrey Edison, on the grounds that he had been retained by the Holyfields. Edison denied this. The Honorable Anna Diggs Taylor granted the prosecutor's motion on August 17, 1982. Allen Reese filed a Notice of Appeal on August 17, 1982. Joseph and Larry Holyfield did not join in the appeal.[5]

The government then filed a motion for computation of excludable delay under 18 U.S.C. § 3161 because of the pendency of the appeal. Both defense attorneys affirmatively stated that they were prepared to go to trial immediately. On October 12, 1982, an order certifying

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5 At the time, the Sixth Circuit had held that such an order was appealable of right. United States v Phillips, 699 F.2d 798 (6th Cir. 1983).

Reese's appeal for oral arguments was issued by the Sixth Circuit Court of Appeals. In pertinent part that order stated:

> "It is further order that all further proceedings in the district court be stayed pending resolution of the appeal."

The order does not state whether it applies to Alan Reese or to all the Defendants. Judge Taylor interpreted this order to apply to all three defendants and stayed proceedings on October 22, 1982. The decision on the Reese appeal was filed on March 16, 1983. United States v. Reese, 699 F.2d 803 (6th Cir. 1983). Subsequently, the government filed a motion to sever the trial of Allan Reese from that of Joseph and Larry Holyfield. This motion was granted. This indictment against Petitioners was dismissed by motion of the Government on

May 11, 1983 because of hospitalization of a government witness.

Alan Reese eventually pled guilty. Defendants Joseph and Larry Holyfield were indicted on October 7, 1983. Larry Holyfield was arraigned on October 21, 1983 and Joseph on October 25th. On November 18th both filed for dismissal under the Speedy Trial Act. Judge Taylor denied this motion on January 16, 1984.

Pursuant to the Speedy Trial Act, 18 U.S.C., § 3161 (c), a trial must commence within seventy days of the day of the indictment or of the first appearance before a judicial officer, whichever occurs last. In this case, the seventy days started on August 6, 1982. Despite the fact Petitioners were tried on second indictment, the time elapsing during both indictments is considered in determining if there has been a violation of the

Speedy Trial Act. 18 U.S.C., § 3161; United States v. Arkus, 675 F.2d 245 (9th Cir. 1982).

Seven months passed while Reese's appeal was pending. The Speedy Trial Act provides that a period of excusable delay is created by "any period of delay resulting from andy proceeding concerning the Defendant, including but not limited to . . . delay from an interlocutory appeal." 18 U.S.C., § 3161 (h) (1) (e). Section 3161 (h) (7) of the Act provides for an exclusion for "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." The question before this Court is whether the emphasized reasonableness provision contained in the above rule limits the application of the

rule in certain limited circumstance.[6] While the Sixth Circuit briefly noted that "the period of delay was reasonable," the Court held "that an exclusion as to one Defendant applies to all other codefendants." A reasonable reading of the appellate court's opinion indicates that the panel intended to lay down a per se rule as to excludability.

When Congress passed the Speedy Trial Act, it made many provisions providing for exclusion of time mandatory. When Congress passed the provision requiring the Court to exclude from Speedy Trial computations a

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6 In Petitioner's brief on appeal to the Court of Appeals, Petitioner argued that as the stay order was worded to apply only to Allen Reese, it did not apply to the Petitioners. Petitioner stands by this assertion, but concedes that it is not the type of national importance as to warrant a petition for certiorari.

reasonable period of time attributable to the delays of a co-defendant, it must be prsumed that they intended to make this time period subject to some sort of equitable review.

Recently this Court evaluated another section of the Speedy Trial Act to determine whether there was a reasonableness limitation contained in Section 3161 (h) (1) (F). Henderson v. United States, 51 U.S.L.W. 4494 (U.S. May 19, 1986), this Court held that there was no "reasonableness" limitation in 18 U.S.C. §3161 (h) (1) (f) requiring the trial judge to exclude from speedy trial computations time attributable to a criminal defendant's motions. This Court held that even if the delay by the trial court on ruling on the motion was unreasonable, a court must exclude this time. In so holding, this Court noted:

> "The plain terms of the statute appear to exclude all time between the filing and the hearing of a motion whether the hearing was prompt or not. Moreover, subsection (F) does not require that a period of delay be 'reasonable' to be excluded although Congress clearly knew how to limit an exclusion in §3161 (h) (7), Congress provided for exclusion of a 'reasonable period of time when the defendant is joined with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." 54 U.S.L.W. 4494, 4496 (emphasis added).

There is absolutely no reason why This case needed to be held in abeyance pending the appeal in the Reese appeal.[7] There was not a common issue with the Reese case in the appeal. The Petitioners did not appear or participate in the Reese appeal. The appeal simply did not

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7 Cf. United States v. Strafford, 697 F.2d 1368 (11th Cir. 1983) where the issue being taken on the interlocutory appeal by a co-defendant was identical to the issue that Strafford had pending before the Court in a Motion to Dismiss.

concern them.

The government was aware that a severance was necessary, because of the potential Bruton[8] problem. They were ultimately the one who moved for a severance because of this problem. In response to the Petitioner's speedy trial motion, the government noted:

> "The subsequent motion by the United States to sever Alan Reese was based upon a clear Bruton problem. Bruton v. United States, 391 U.S. 123 (1968). This was a situation in which the United States anticipated that the co-defendants to raise the issue and when they didn't the United States did." Memorandum of Law in Support of Response of the United States in Opposition to Motion to Dismiss, p. 2.

Thus the government clearly knew there was a problem in trying the

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[8] Bruton v. United States, 391 U.S. 123 (1968).

Defendants together.[9] Yet, with the Petitioner's clamoring loudly for an immediate trial, the Government sat back and relied on the pendency of a Co-Defendant who they fully knew had to be severed off before trial.

The fact that the Government thought that they might be able to get Reese to inform against the Holyfields does not change this. Firstly, they had nothing tangible to support this belief. Secondly, this is simply not a proper consideration. See for example United

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9 In a very real sense, it is the Government is more aware of potential Bruton problems. It is the government that originally knows of the confession. It is the Government who knows best that the confession will be used, for instance the Government may have overwhelming evidence against several defendants and forego using the confession as a tradeoff for having just one trial instead of two or three. The Government may know that the confessions are interlocking and therefore admissible. Parker v. Randolph, 442 U.S. 62 (1979).

States v. Didier, 542 F.2d 1182 (2nd Cir. 1976).[10] There was absolutely no reason

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10 "The government's desire to await the results of Ashdown's appeal, however, was clearly not a sufficient reason for delay. While reasonable delays caused by missing defendants may be excusable . . . here both defendants were available for trial. Ashdown's testimony was not necessary to the government's case, as is evidenced by the fact that appellant was convicted without it. At best the requested delay was a government maneuver designed to bolster its case against Didier, if Ashdown's conviction in the Fifth Circuit should be affirmed, thus assuring that he would serve a sentence on that charge, conviction of Ashdown in the present case would become less important and the government would be willing to give him immunity for his testimony against Didier. The desire to gain such a tactical advantage. however, is not a sufficient reason for trial delay." 542 F.2d 1182, 1187. For a case reaching a contrary holding on this issue, see United States v. Tedesco, 726 F.2d 1216 (7th Cir. 1984); United States v. Marrero, 705 F.2d 652, 658 (2d Cir. 1983). In Didier, the Government would have given the co-defendant immunity if his other conviction was affirmed. Immunized testimony can be compelled from a defendant as there are no self-incrimination concerns. Kastigar v. United States, 406 U.S. 441 (1972). In Tedesco, the witness had already agreed to testify in exchange for immunity. He

for an exemption of the time on this theory.

Statutes are normally to be construed by their fair and ordinary meaning. Where a statute is clear in its wording, there is no need for this Court to look any further to determine what Congress meant to say. United States v. Rojas-Contreras, 106 S.Ct. 555, 557 (1985). The delay at issue was not reasonable.

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backed out at the last minute. In both cases, gaining this testimony was a realistic possibility. At no proceeding below has the government indicated that they would have indicated that they would have done such. Thus the chance that they would have obtained this witnesses testimony is no greater than say a surprise witness coming up.

II.

PRESENCE

What is the proper test in waiving the defendant's right to presence at every stage of the trial? This question has never been answered definitively by this Court. Because of this silence, the interpretation of this has varied from jurisdiction to jurisdiction.

The origins of the right to presence can be traced back to the Bible. At common law, the Defendant had no right to counsel, therefore he was required to defend himself. Because of this the defendant was required to be at each and every stage of the proceedings.[11] This right was thereafter incorporated into

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[11] Note, The Illness Exception: The Eleventh Circuit and the Right to be Present at Trial, 34 Mercer L.R. 1521, 1522 (1983) ["The Illness Exception"].

the Bill of Rights.

Early on it was recognized that this rightwas as much important to the protection of a criminal defendant who was represented by counsel as the one who was not. In the seminal case of Hopt v. Territory of Utah, 110 U.S. 574 (1884) this Court had the opportunity to note the reason for this right was that an accused's

> "life or liberty may depend on the aid, which, by personal presence, he may give to counsel and to the court and triers, in the selection of jurors."

Thus while the right may have been originally created to protect the rights of the pro se defendant, the rule maintains its viability when counsel enters an appearance. In Snyder v. Massachusetts, 291 U.S. 97 (1934):

> "The right to presence is founded on the basis that the defense may be made easier if

> the accused is present to give advice, or suggestion or even to supersede his lawyer altogether and conduct the trial himself."

It is admitted that this right can be waived in non-capital cases, but it is unclear what standard is to be applied. This confusion has resulted in a wide diversity in opinion in the lower courts on this issue.[12]

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12 For instance, some courts have held that the waiver may only be made by the Defendant. State v. Shackleford, 59 N.C. App. 357, 296 S.E.2d 658 (1982) (may not be waived by counsel, only Defendant); Francis v. State, 413 S.O.2d 1175 (Fla. 1982) (same); Commonwealth v. Tolbert, 246 Pa Super 23, 369 A.2d 791 (1972) (it is ineffective assistance of counsel to do so); Contra State v. Collins, 133 Ariz. 20, 648 P.2d 135 (App. 1982) (may be waived by counsel). Others differ as to whether the standard for waiver of constitutional rights set forth in Johnson v. Zerbst is applicable in cases involving waiver of the right to be present. Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963) (warning required); States v. Haynes, 118 Wis. 2d 21, 345 N.W. 2d ____ (1984) (same); Proffit v. Wainright, 685 F.2d 1227, 1258 (11th Cir. 1982) (alternate holding). Cf State v.

The right to be present at one's trial is "one of the most basic rights."[13] Yet despite the fundamental nature of this remedy, several exception. First, a Defendant may,in the discretion, of a trial court waive the right.[14] A Defendant can also waive his right to

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Collins, supra; Williams v. State, 292 Md. 201, 438 A.2d 1301 (1981) (knowing relinquishment of intentional right standard is unsound in cases dealing with right to presence). Earlier Maryland decisions had recognized the intentional waiver rule. Porter v. State, 289 Md. 349, 424 A.2d 371 (1981); Bunch v. State, 281 Md. 1142, 381 A.2d 1142 (1978).

13 Illinois v. Allen, 397 U.S. 337 (1970).

14 Proffit v. Wainwright, 685 F.2d 1227, 1257. Of course, this is subject to the discretion of the trial court. Just because the Defendant has a constitutional right, does not mean that he has a right to waive that right. "The right to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. Singer v. United States, 380 U.S. 24, 34-35 (1966). The primary holding in Proffit was that a capital defendant could not waive his right to presence.

presence by fleeing in the middle of the trial. Taylor v. United States, 414 U.S. 174 (1973)[15], or by being extremely disruptive in the a courtroom. Illinois v. Allen, 397 U.S. 337 (1970). While there are certain compelling circumstances in which the Petitioner's right to presence may be abridged, these circumstances are extremely narrow. The decision below establishes an all to liberal test for waivers of this vital right.[16] At the hearing to certify the facts, Judge Taylor was unable to recall whether she questioned the Petitioner

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15 At least one Circuit has held that the discretion of the Court to proceed with a trial in absentia is "narrow." United States v. Benavides, 596 F.2d 137, 139 (11th Cir. 1979).

16 An earlier Sixth Circuit cases held that the waiver of presence can only be knowingly and freely given. Evans v. United States, 284 F.2d 393 (6th Cir. 1960).

about his knowing that the proceedings could have waited for him. There is no question but that Petitioner's absence was not voluntary. He was hospitalized for brleeding ulcers. As soon as he was released, he returned to court. This is not a voluntary absence. The Illness Exception, 34 Mercer 1521, 1526; Dasher v. Stripling, 685 F.2d 385 (11th Cir. 1982).

A waiver of a right requires that the Defendant first be advised of that right and then freely voluntarily and knowingly waive the right. Johnson v. Zerbst, supra; Faretta v. California, 422 U.S 387 (1974); Brewer v. Williams, 430 U.S. 387 (1976); Cf Schneckloth v. Bustamonte, 412 U.S. 218 (1972) (criminal defendant need not be told that he has right to refuse search in order to make search valid). While as noted before,

there is some contrary authority in decisions in lower courts, particularly in this opinion below, the decisions of this Court have almost uniformly required such a showing.

In Illinois v. Allen while this Court did allow a disruptive defendant to be removed from the courtroom against his will, this Court imposed the following requirement in terms of warning the defendant:

> "[That he] has been warned by the judge that he will be removed if he continues his disruptive behavior and he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." 397 U.S. 337, 343 (emphasis added).

In reaching this finding this Court relied on Johnson v. Zerbst, which of courses requires this emphatic waiver. The decision in Allen simply reinforces

that age old saying that "actions speak louder than words."

If it can be said that a criminal defendant can waive a right by behaving in an outrageous way in the courtroom after being warned to stop, it can also be said that his fleeing in the middle of the trial indicates a clear and unequivocal waiver of his right to be there. Hence the decision in Taylor truly adds nothing to this analysis.

The decision of this Court in Drope v. Missouri, however, is a different story. In Drope, the Defendant was mentally incompetent at the time of trial. In determining that there was an insufficient on the record waiver of the defendant's right to presence, this Court concluded that there was not a knowing and voluntary waiver of the right. In so holding, this Court relied on Westbrook

v. Arizona, 384 U.S. 150 (1966). Westbrook relied on Johnson v. Zerbst.

Trials in absentia are repugnant to our notion of jurisprudence. This Court has previously held that a criminal defendant is ordinarily bound to the actions or ommissions of his attorney, unless the Defendant speaks out. Estelle v. Williams, 425 U.S. 501 (1976).

While the denial of the right to presence can be held to the harmless error standard. Rogers v. United States, 422 U.S. 35 (1975); Chapman v. California, 386 U.S. 18 (1968). See also Delaware v. Arsdall, 54 U.S.L.W. 4347 (U.S. 1986) (error must be harmless beyond reasonable doubt). The proceedings at issue were a part of the trial where witnesses were cross examined by the defense. There is nothing these

witnesses can be called by damaging.[17]

The error was not harmless.

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[17] While Petitioner could provide a series of hypothetical of what he could have done differently if he had been at trial, this would be nothing more than idle speculation of what would have happened at trial. Nor could this subject be properly addressed at a remand hearing. Holding such a hearing that many years after the fact can only result in an arbitrary ruling with little correlation with the actual facts. Because of this, the only remedy available on this issue is a new trial. Smith v. State, 372 S.O.2d 86 (Fla. 1979).

RELIEF REQUESTED

For all of the reasons stated above, Petitioner requests this Court issue a writ of certiorari or alternatively remand this matter for further proceedings in the Sixth Circuit.

Respectfully submitted,

SUZANNE CAROL SCHUELKE
22306 West Warren
Detroit, MI 48239
(313) 274-5660

CERTIFICATE OF SERVICE

A copy of the attached Petition for Writ of Certiorari was served by mail on this ____ day of November, 1986 on Patricia Blake, Chief Assistant United States Attorney, Appellate Division, United States District Attorney for Eastern District of Michigan, Federal Building, Detroit, MI 48226.

SUZANNE CAROL SCHUELKE,
a Member of the United
States Supreme Court Bar

No._____

In The
UNITED STATES SUPREME COURT
October Term, 1986

JOSEPH HOLYFIELD, JR.,
and LARRY HOLYFIELD,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

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(313) 274-5660

Attorney for Petitioners

TABLE OF CONTENTS

SIXTH CIRUCIT ORDER STAYING PROCEEDINGS IN UNITED STATES V. REESE

No. 82-1623
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs. ORDER
ALAN WAYNE REESE,
Defendant-Appellant.

BEFORE: KEITH, MERRIT, AND CONTIE, Circuit Judges.

Defendant is appealing from an order granting the Government's motion to disqualify his attorney. The Government has moved to dismiss the appeal and to consolidate the case with 82-1468.

Upon consideration, we conclude that the jurisdcitional question presented in this case, as well as defendant's substantive claims, should be orally argued. According, it is ORDERED that the Government's motion to dismiss be

reffered to the panel of the Court assigned to hear the case.

It is further ORDERED that this case be consolidated with No. 82-1468 for purposes of briefing and argument. The Clerk is hereby directed to establish an expedited briefing schedule and to schedule and to schedule this case for argument during December, 1982.

It is further ORDERED that all further proceedings in the district court be stayed pending resolution of this appeal.

ENTERED BY ORDER OF THE COURT

/S/ JOHN P. HEHMAN, Clerk

A true copy

Attest:

JOHN P. HEHMAN, Clerk

By: /s/ Linda Brinson
Deputy Clerk

DISTRICT COURT ORDER STAYING ALL DEFENDANT'S TRIAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff
-vs-
ALAN WAYNE REESE, at al.,
Defendants.
_____/

ORDER

This matter having come before this court on motion of theUnited States for computation of excludable delay under the Speedy Trial Act, 18 USC §1361, and an interlocutory appeal have been taken from this court's order of August 17, 1982 disqualifying counsel for defendant, Alan Wayne Reese.

And co-defendants Larry Holyfield and Joseph Holyfield, Jr., having both filed motions for speedy trial, and the court being fully advised in the premises,

IT IS ORDERED in accordance with the Order of the United States Court of Appeals for the Sixth Circuit of October 7, 1982:

> . . . that all further proceedings in the District Court be stayed pending resolution of the (Alan Wayne Reese) appeal . . .

That all further proceedings in this case are stayed in accordance with the Order of the Sixth Circuit Court of Appeals.

IT IS SO ORDERED.

/s/ Anna Diggs Taylor
ANNA DIGGS TAYLOR,
District Judge

Dated: 22 Oct 1982

CERTIFICATE OF SERVICE

Three copies of Petitioner's Petition for Writ of Certiorari and this Appendix were served by mail on December 11, 1986 on the United States Solicitor's Office, Room 5614, Department of Justice, Washington, DC 20530.

One copy of this Appendix was served on Patricia Blake, United States Attorney, Eastern District of Michigan, Federal Building, Detroit, MI 48226

SUZANNE CAROL SCHUELKE,
a Member of the United
States Supreme Court Bar

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-1506 & 84-1508

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH HOLYFIELD, JR., AND LARRY HOLYFIELD,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 1, 1986

Before: JONES and NELSON, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

PER CURIAM. The defendants appeal the judgments entered on their bank robbery convictions. Both defendants claim that their right to a speedy trial was denied by the delays involved in this case. Joseph Holyfield also claims that his right to be present at his trial was violated. We affirm the judgments of conviction.

On June 30, 1982, three men robbed the Liberty State Bank and Trust Company of Hamtramck, Michigan. After an FBI investigation, Joseph and Larry Holyfield were arrested on July 1. An indictment was returned against them and a co-

defendant, Alan Reese, on July 29. They were arraigned on August 6. At some point Reese made a confession implicating himself and the Holyfields in the robbery.

On August 14, the government filed a motion to disqualify Reese's retained attorney for a conflict of interest, alleging that the attorney had also been retained by the Holyfields. After a hearing on August 17, the district court granted the motion to disqualify. On August 24, Reese appealed that order to this court. On September 21, the government filed a motion for computation of excludable delay under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (1982), as to all defendants pending resolution of Reese's appeal. The Holyfields opposed the motion, stating that they were prepared to proceed to trial. On October 7, a motions panel of this court ordered Reese's interlocutory appeal to be orally argued and stayed all further proceedings. On October 26, the district court, construing this court's stay order as applying to all defendants, responded to the government's motion by staying the proceedings against all defendants.

On January 21, 1983, this court reversed the order disqualifying Reese's attorney because the district court had failed to conduct an evidentiary hearing. *United States v. Reese*, 699 F.2d 803 (6th Cir. 1983). A mandate was issued by this court on March 14, 1983. Subsequently, the government moved to sever Reese's case from the Holyfields' because Reese's confession would not have been admissible in the Holyfields' trial. The court granted the motion, and, shortly thereafter, Reese pled guilty.

The Holyfields' trial was first set for February 16, 1983. The trial date was subsequently reset twice, first for March 29, and then for May 17. Just prior to the May 17 trial date, a prosecution fingerprint expert suddenly became ill and was hospitalized, and on May 12, 1983, the indictment against the Holyfields was dismissed.

On October 24, 1983, a new indictment was filed. On November 18, the defendants moved to dismiss the indict-

ment for violation of the Speedy Trial Act. The motion was denied. The trial began on April 18, 1984, and both defendants were convicted and sentenced to fifteen year prison terms.

I.

The defendants assert that the delays in this case violated their rights under both the Speedy Trial Act and the Sixth Amendment. We will address each of these claims separately.

A. Speedy Trial Act

The Speedy Trial Act requires that a defendant's trial commence:

> within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c)(1). Certain periods of delay are excludable from the calculation of the seventy days. *Id.* § 3161(h). These include delays from other proceedings concerning the defendant, including "an interlocutory appeal," *id.* § 3161(h)(1)(E), and "pretrial motion[s], from the filing . . . through the conclusion of the hearing or other prompt disposition." *Id.* 3161(h)(1)(F). They also include "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." *Id.* § 3161(h)(7). A defendant is entitled to a dismissal on his motion if the government fails to try him within the appropriate period. *Id.* § 3162(a)(2). However, the defendant's failure to make the motion constitutes a waiver. *Id.*

The Holyfields are claiming that the delay caused by Reese's interlocutory appeal violated their right to a speedy trial. But, as noted *supra,* section 3161(h)(7) of the Act pro-

vides for an exclusion for "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted."

We have not previously interpreted this section. However, every circuit court that has considered this section has concluded that "an exclusion applicable to one defendant applies to all co-defendants." *United States v. Edwards*, 627 F.2d 460, 461 (D.C. Cir.), *cert. denied*, 449 U.S. 872 (1980); *see also United States v. Rush*, 738 F.2d 497, 504 (1st Cir. 1984); *United States v. Tedesco*, 726 F.2d 1216, 1219 (7th Cir. 1984); *United States v. Campbell*, 706 F.2d 1138, 1141 (11th Cir. 1983); *United States v. Fogarty*, 692 F.2d 542, 546 (8th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); *United States v. McGrath*, 613 F.2d 361, 366 (2d Cir. 1979), *cert. denied*, 446 U.S. 967 (1980). We now join the other circuits and hold that under section 3161(h)(7) an exclusion as to one defendant applies to all other codefendants.

On appeal, the parties addressed only the question of whether the period of delay caused by Reese's interlocutory appeal was properly excluded by the district court. We have reviewed the record and, absent the period of delay related to the interlocutory appeal, the seventy day period did not expire before the Holyfields were brought to trial. Therefore, if we conclude that the delay caused by Reese's interlocutory appeal was properly excludable, then the Holyfields' claim that their Speedy Trial Act rights were violated must fail.

A review of the record indicates that the entire period between August 24, 1982, the day that Reese filed his interlocutory appeal, through March 14, 1983, the day that disposition of the appeal was completed, was excludable under section 3161(h)(1)(E). Since this time was excludable as to Reese, it was also excludable as to his codefendants, the Holyfields. Since the period of delay caused by Reese's interlocutory appeal was properly excluded under section 3161(h)(1)(E), and the period of delay was reasonable under section

3161(h)(7), we conclude that the district court properly denied the Holyfields' motion to dismiss their indictments for violation of the Speedy Trial Act.

B.

Sixth Amendment

The Holyfields also assert that the delays in the case violated their right to a speedy trial under the Sixth Amendment. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court announced a four-part balancing test to determine whether a pre-trial delay infringed on the right to a speedy trial. That test assesses "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530. An application of that test to this case indicates that, on balance, the delay caused by the Reese appeal does "not justify the severe remedy of dismissing the indictment." *See United States v. Loud Hawk*, 106 S. Ct. 648, 657 (1986).

Approximately fifteen months passed between the date of the first indictment and the date of trial, not counting the period between dismissal and reindictment. The Holyfields' claim of unexcusable delay focuses only on the five month period that Reese's appeal was pending. This cannot be said to be an extraordinary length of time and the first *Barker* factor, length of delay, does not appear to weigh heavily in favor of the Holyfields.

The second factor, reason for the delay, does, however, favor the Holyfields. The delay was caused by a codefendant's appeal and was not induced by them nor did it involve them. They could have been tried soon after the first indictment. The government, however, chose to wait.

The third factor, the defendants' assertion of their rights, does favor them. They did assert their right to a speedy trial in opposition to the government's motion for calculation of excludable delay during the Reese appeal.

The last factor, prejudice, has little weight in this case. Apart from Reese's testimony and fingerprint evidence, the government's case turned on eyewitness identification; the defendants presented no alibi or other affirmative defense. Thus, the effect of delay upon the memory of the witnesses would work in favor of the defendants, not against them. When these factors are balanced, we cannot say that the Holyfields' Sixth Amendment rights were violated.

II.

Finally, Joseph Holyfield asserts that his right to be present at his trial was violated when the trial continued for one day in his absence.[1] A defendant does have a constitutional right to be present during his trial, but that right can be waived. *Taylor v. United States*, 414 U.S. 17, 18-20 (1973).

It is undisputed that on the day of Holyfield's absence his counsel and the judge, in the presence of other counsel, telephoned him from the judge's chambers. The judge made the following statement on the record, which Holyfield's trial counsel confirmed as correct, as to the contents of her conversation with Holyfield:

> The court and all counsel went into chambers and called Mr. Holyfield, reached him in the Emergency Room at Receiving Hospital on the speaker phone and Mr. Henry talked to his client Mr. Holyfield and Mr. Holyfield authorized Mr. Henry and the Court to proceed with the trial in his absence.

Jt. App. at 222.

This sufficiently indicates that Holyfield waived his right to be present. The district court did not err in continuing

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[1]Joseph Holyfield also claims that the district court erred when it ordered him to put on a cap and glasses for identification during the trial. The court did not abuse its discretion in this instance, and Holyfield's conviction cannot be reversed on these grounds.

in his absence.

Therefore, the judgments of conviction are AFFIRMED.